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8
9

10 UNITED STATES DISTRICT COURT
11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

12 OLIVIA GARCIA, Regional Director)
of Region 21 of the National Labor)
13 Relations Board, for and on behalf of)
14 the NATIONAL LABOR)
RELATIONS BOARD,)

15 Petitioner,

16 v.

17 HIGH FLYING FOODS,

18 Respondent.
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Case No. 15cv0039-GPC(JLB)

PETITIONER'S REPLY TO
RESPONDENT'S OPPOSITION TO
PETITION FOR TEMPORARY
INJUNCTION UNDER SECTION
10(J) OF THE NATIONAL LABOR
RELATIONS ACT, AS AMENDED
(29 U.S.C. Sec. 160(j))

Date: February 6, 2015

Time: 1:30 p.m.

Judge: Hon. Gonzalo P. Curiel

Courtroom: 2D

1 **I. INTRODUCTION**

2 Petitioner has petitioned for a temporary injunction against the
3 Respondent High Flying Foods (herein Respondent) based upon a substantial
4 likelihood that Petitioner will establish in the Board's administrative proceeding,
5 which were held January 12 through 16, 2015: that Respondent committed the
6 unfair labor practices described in the administrative complaint; that failure to
7 obtain an injunction during the pendency of the administrative proceeding will
8 irreparably harm employees, the Union, and the Board's remedial authority; that
9 the balance of the equities tips in favor of granting an injunction; and that the
10 public interest will be served by granting the injunction.

11 **II. PETITIONER HAS SHOWN THAT IT HAS A SUBSTANTIAL**
12 **LIKELIHOOD OF SUCCESS OF THE MERITS**

13 Petitioner filed the instant petition after conducting a thorough
14 administrative investigation and issuance of a complaint based upon sworn
15 evidence presented by witnesses provided by both the Union and Respondent,
16 most of which evidence from the Union was attached to the petition in support
17 thereof.

18 Respondent, in support of its opposition to the petition, has lodged partial
19 excerpts of the transcript of the recent administrative hearing at which all parties
20 presented witnesses and evidence. Petitioner respectfully submits that, pursuant to
21 FRE Rule 106, the entire transcript consisting of 1351 pages and several hundred
22 pages of exhibits should have been made available to the Court for its
23 consideration, and not just the 200-some pages and selected exhibits that
24 Respondent has chosen to support its opposition. In the interests of brevity,
25 however, and given the short time before the scheduled hearing, Petitioner will
26 likewise provide appropriate excerpts of the transcript, attached as Exhibit A, to
27 support its reply. Petitioner will, upon request of the Court, lodge the entire
28 transcript should the Court so desire.

1 Respondent cites examples of contradictory evidence and credibility issues
2 in the administrative hearing to support its assertion that Petitioner has no
3 likelihood of prevailing on the merits of the case. Conflicting evidence “does not
4 preclude the Regional Director from making the requisite showing for a section
5 19(j) injunction.” *Frankl v. HTC Corp.*, 693 F.3d 1051 at 1063. Despite the
6 incomplete evidence relied upon by Respondent for this proposition, it remains the
7 case that the Court is not being called upon to make final credibility findings or
8 even findings on the allegations in the complaint. Rather, The District Court’s role
9 is to conduct a limited review of the merits of the unfair labor charges to evaluate
10 whether the Regional Director is likely to prevail before the Board.¹ Thus, the
11 Board itself retains exclusive jurisdiction over the unfair labor practice allegations.

12 Moreover, a Section 10(j) proceeding is not a full trial on the merits of the
13 underlying unfair labor practice. Therefore, the Court should give the Regional
14 Director the benefit of the doubt on factual matters and refrain from weighing the
15 credibility of the witnesses.² Because the Regional Director is not required to
16 prove the violations, but rather show likelihood of success that the alleged
17 violations occurred, the Court is not the finder of fact who must believe of
18 disbelieve testimony.

19 Petitioner submits that it has provided sufficient evidence to allow the Court
20 to conclude that Petitioner is likely to prevail on the merits of the administrative
21 complaint, notwithstanding assertions of Respondent to the contrary.

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24 ///

26
27 ¹ See *Frankl v. HTH Corp.* 650 F.3d 1334, 1356 (9th Cir. 2011), cert denied 132
S.Ct. 182 (2012)).

28 ² See, e.g., *Scott v. Stephen Dunn & Assoc.*, 241 F.3d 652, 662 (9th Cir. 2001)

1 **1. Petitioner has shown that Respondent harbored union**
 2 **animus**

3 Respondent devotes much of its opposition to arguing that it is not “anti-
 4 union,” citing the agreed-to neutrality agreement and card-check procedure.
 5 Notwithstanding the fact that these were requirements to its taking over the food-
 6 service operations at the San Diego airport, and therefore not entirely altruistic,
 7 Respondent’s conduct since recognizing the Union has been designed to
 8 undermine the authority of the Union and its ability to bargain on behalf of the
 9 employees who selected it to represent them.

10 Particularly, the unilateral promulgation of the revised employee handbook
 11 and the requirement that employees acknowledge that Respondent can change
 12 their terms and conditions of employment at any time shows how little regard
 13 Respondent has for the Union and its bargaining authority. In this regard, the
 14 changes were not merely to “clarify” pre-existing rules or to update California law,
 15 as Respondent asserts, since its own highlights of the revisions shows many
 16 changes in time-and-attendance rules, absenteeism rules, and other rules, for which
 17 violation could lead to discipline or termination.³ Respondent does not dispute
 18 that it failed to give the Union notice or the opportunity to bargain over these
 19 revised rules and their effects on the employees – a fundamental violation under
 20 the Act which no company that operated on a “union model” would make.⁴
 21 Moreover, even if Respondent did agree to bargain about the changes after they
 22 were unilaterally promulgated, such “fait accompli” bargaining has long been held
 23

24 ³ See Petition Exhibit 3, pp. 54-58. An employer’s unilateral change in a
 25 mandatory subject of bargaining (i.e., a term and condition of employment) during
 26 collective-bargaining negotiations violates the Act. *NLRB v. Katz*, 369 U.S. 736
 27 (1961). Contrary to Respondent’s assertions, it is immaterial that changes were
 28 companywide and as such involved both union and non-union employees. See
CompuNet Communications, 315 NLRB 216, 222 (1994).

⁴ See *United Cerebral Palsy*, 347 NLRB 603 (2006).

1 to be unlawful, since it deprives the union of any meaningful opportunity to
2 discuss the issues after they have been put into effect. The Board has long held
3 that an employer's presentation of a "fait accompli" proposal at the outset of
4 negotiations necessarily obstructs meaningful bargaining.⁵

5 Furthermore, the anti-union aspect of this conduct cannot be ameliorated by
6 after-the-fact bargaining, since the unilateral promulgation of terms and conditions
7 of employment sends the message to the employees that the Respondent has no
8 respect for the Union, and that the Union cannot effectively represent them.⁶

9 Respondent also demonstrated union animus when it forbade employees
10 from soliciting for the Union or even talking about the Union, and then disciplined
11 them for doing so. As noted in the petition, it is well-established Board law that an
12 employer may lawfully prohibit employees from talking about a union during
13 periods when employees are supposed to be actively working; however, an
14 employer violates the Act when it forbids employees from discussing a union but
15 allows them to discuss other subjects unrelated to work.⁷

16 It is undisputed that Respondent was aware that employees discussed a wide
17 range of topics both during work and non-work time.⁸ However, the evidence
18 shows that only employees who spoke about the Union were disciplined.

19 For example, Francisco Hernandez was suspended not for talking to an on-
20 the-clock employee about "outside business," as Respondent asserts, but
21 specifically for talking about the Union. This is borne out by Respondent's own
22 internal e-mail, where this conduct was described as the "last straw," and the
23

24 ⁵ *Allied Products Corp.*, 218 NLRB 1246 (1975), *enf'd in rel. part*, 548 F.2d 644
25 (6th Cir. 1977), citing *NLRB v. Williamsburg Steel Products Co.*, 369 U.S. 736
(1962).

26 ⁶ *See Tecumseh Packaging*, 352 NLRB 694 (2008).

27 ⁷ *Stevens Construction Corp.*, 350 NLRB 132, 134 (2007); *Jensen Ent.*, 339 NLRB
28 877,878 (2003).

⁸ See Exhibit A, pp. 11-12.

1 managers agreed to ask Hernandez to confirm that he was talking about the Union
2 so they could suspend him. This warning is cited in Hernandez's final warning as
3 talking about "Union business" and relied on for his termination.⁹ Thus, is it clear
4 that the actions taken against Hernandez were motivated by his support of the
5 Union, and not by his discussion of "outside business," like vacuum cleaners.

6 Likewise, Mirna Soto was suspended and subsequently terminated shortly
7 after she was observed showing a Union flyer to a coworker, who was then
8 questioned about the subject of the conversation by management. Specifically,
9 this employee was told that he could not talk about the Union while on the clock.¹⁰

10 Likewise, employee Martin Duarte was given a written warning specifically
11 for "discussing Union matters" with another employee.¹¹ Thus, the evidence is
12 clear that Respondent intended to restrain employees from discussing the Union –
13 even after the Union had been recognized by Respondent as the exclusive
14 collective-bargaining representative of the employees. Therefore, Petitioner is
15 likely to succeed in showing that Respondent harbored union animus and that the
16 foregoing disciplinary conduct was unlawful.

17 **2. Petitioner has demonstrated retaliation based on union**
18 **animus**

19 Based upon the foregoing, Petitioner is also likely to succeed in
20 showing that the discharges of Soto and Hernandez were motivated by anti-union
21 animus. With regard to Hernandez, Respondent asserts that a number of incidents
22 led to the decision to terminate him, including his talking to others about the
23

24 ⁹ See Exhibit A, p. 14-17.

25 ¹⁰ See Respondent's Opposition at p.14:7-8 and referenced transcript pages.
26 Ironically, the manager himself then spoke to this employee at length about a
27 number of non-work-related issues while the employee was on the clock, belying
28 Respondent's assertion that it was concerned with discussions of an "interfering
nature."

¹¹ See Exhibit A, p. 20.

1 Union and his circulation of Union literature. Thus, Respondent cannot show that
2 it would have terminated Hernandez had he not engaged in union activity,
3 notwithstanding his alleged failure to understand and execute the new invoice
4 check-off procedure.

5 With regard to Soto, Respondent asserts that she was terminated based on:
6 her violation of the English-only rule; her alleged insubordination when she
7 engaged her supervisor in discussion about the rule and then criticized the rule in
8 the vicinity of customers; her alleged confrontation of employee Kara Schaal
9 about the English-only rule; and an alleged threat of physical harm against her
10 supervisor.

11 Soto denies most of these incidents, but even if they had occurred as
12 Respondent asserts, there is insufficient evidence to show that Respondent would
13 have terminated her notwithstanding her union activity and support. Respondent
14 produced no evidence at the administrative proceeding that any other employee
15 had been terminated for similar conduct. In fact, Respondent's documents showed
16 only one other employee had ever been disciplined for violation of the English-
17 only rule, and that employee merely received a written warning.¹² Moreover, the
18 termination notice issued to Soto does not list any specific incidents, and
19 Respondent's management did not give her any explanation as to why she was
20 being terminated, depriving her of the right to defend or deny the allegations
21 against her.¹³

22 The Board recently issued a decision in *Alternative Energy Applications,*
23 *Inc.*, 361 NLRB No. 139 (Dec. 16, 2014) that, while dealing with different facts,
24 provides an instructive analysis of many of the issues in the instant case. The
25 Board stated that in determining whether an employee's discharge is unlawful, it
26

27 ¹² See Exhibit A, pp. 16-17.

28 ¹³ See Exhibit A, pp. 22-24.

1 applies the mixed-motive analysis set forth in *Wright Line*, 251 NLRB 1083
2 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S.
3 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S.
4 393 (1983). Under *Wright Line*, the General Counsel of the NLRB must
5 demonstrate by a preponderance of the evidence that the employee's union activity
6 was a motivating factor in the adverse action taken. This burden is satisfied by
7 showing (1) the employee's protected or union activity, (2) the employer's
8 knowledge of that activity; and (3) the employer's union animus. Once this initial
9 burden is met, the burden then shifts to the employer to prove that it would have
10 taken the adverse action even absent the employee's protected or union activity.
11 The employer cannot meet its burden merely by showing that it had a legitimate
12 reason for its action; rather it must demonstrate that it would have taken the same
13 action in the absence of the protected or union activity. If the employer's
14 proffered reasons are pretextual – i.e., either false or not actually relied on – the
15 employer fails by definition to show that it would have taken the same action
16 regardless of the protected activity. *Alternative Energy*, *supra*, slip op. at p.3, and
17 cases cited therein.

18 In the instant case, Petitioner has a strong likelihood of meeting its burden,
19 in that there is no dispute that the Hernandez, Soto, and Duarte all openly engaged
20 in Union activity and participated on the negotiation committee for the initial
21 collective-bargaining agreement, of which Respondent was fully aware. As shown
22 above, Petitioner can also demonstrate that Respondent harbored union animus in
23 general, and towards these employees in particular.

24 Moreover, Petitioner has demonstrated that Respondent most likely will not
25 be able to carry its rebuttal burden. In *Alternative Energy*, *supra*, slip op. at p.5,
26 the Board noted that the employer's stated rationale for firing an employee who
27 was engaged in protected activity was that he had a "bad attitude" and a "poor
28

1 work ethic.” The Board rejected these reasons as pretextual, particularly since the
2 employer had admitted it was aware of and did not approve of the employee’s
3 protected activity.

4 Most applicable to the instant case is the Board’s statement that:

5 The Act protects all employees, not just exemplary employees, from
6 adverse action by an employer based on their protected activity. In
7 cases like this, in which there may have been lawful grounds for
8 discipline, it is our [the Board’s] job to determine whether the alleged
9 discriminatee was indeed disciplined because of his protected activity,
10 using the analytical tools developed by the Board over its many years
11 of enforcing this provision of the Act, with the approval of the Courts.
The Respondent may have had legitimate reasons for discharging [the
employee]. But under the Act, given the clear evidence of unlawful
motive, that is not enough. *Ibid.* slip op. at p.5

12 In the instant case, Respondent’s characterizations of Hernandez as insubordinate
13 and Soto as an “abrasive” and “territorial” employee who “did not work well and
14 play well with others”¹⁴ is not sufficient to show that they would have been
15 terminated for the reasons articulated by Respondent in the absence of their open
16 and notorious union activity. Thus, Petitioner submits that it has a strong
17 likelihood of prevailing in showing that their suspensions and discharges, as well
18 as the suspension of Duarte, were discriminatorily motivated by their union
19 activity.

20 21 **III. PETITIONER HAS SHOWN IRREPARABLE HARM**

22 Respondent in its opposition to the petition has urged that its actions are
23 “sporadic and isolated events” which are not serious enough to warrant equitable
24 relief, particularly inasmuch as the ongoing bargaining process has not been
25 threatened.

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27
28 ¹⁴ See Exhibit A, p. 25.

1 However, Petitioner has presented abundant evidence in support of its
2 petition showing that support for the Union has eroded since Respondent bypassed
3 the Union and unilaterally changed terms and conditions of employment, and
4 prohibited employees from discussing the Union at work. Specifically, witnesses
5 provided sworn statements that fewer employees attended weekly Union meetings
6 and attendance of employees at the negotiation sessions fell off precipitously.
7 Additionally, the Union has found it difficult to communicate with the employees
8 after Hernandez and Soto were terminated, since they were the primary conduits of
9 information about the Union to the employees.¹⁵ Employees are now afraid of
10 talking about the Union at work— even though the Union is their chosen
11 representative—and they fear being targeted by Respondent.¹⁶

12 Furthermore, it is inherently incredible to argue that the collective
13 bargaining process has not been negatively impacted by the discharge of nearly
14 half of the employee members who were selected by their peers to represent their
15 concerns at the negotiations for an initial contract.

16 **IV. THE BALANCE OF HARDSHIPS FAVORS INJUNCTIVE RELIEF**

17 As noted in the petition, the balance of hardships clearly favors granting
18 interim relief, in that the Union has already begun to lose the confidence of the
19 employees and the bargaining efficacy of the Union will be severely undermined.
20 In this regard, the rescission of the unilaterally-promulgated work rules and the
21 restoration of the status quo ante, including the reinstatement of prominent Union
22 supporters, will restore employee confidence in the Union and allow the Union to
23 effectively bargain on their behalf.

24 On the other hand, Respondent's hardship is relatively light, since it will
25 reinstate two experienced former workers. Respondent's assertion that the

27 ¹⁵ See Petition Exhibit 3 pp. 105-06)

28 ¹⁶ See Petition Exhibit 3 pp. 107; 167-68.

1 reinstatement of Mirna Soto will put others at risk and undermine its authority to
2 protect employees from threats is not supported by the evidence, and, moreover,
3 Soto has already been suspended for her alleged conduct. Likewise, Hernandez
4 was also suspended for his alleged inability to follow work orders. As noted
5 above, Respondent has failed to show that it terminated others for similar conduct,
6 thereby undermining its argument that these employees are unsuitable to work for
7 Respondent.

8 **V. CONCLUSION**

9 Interim relief is just and proper to prevent further frustration of the policies
10 and remedial purposes of the Act. Accordingly Petitioner respectfully requests that
11 this Court grant the requested relief.

12 DATED at Los Angeles, California, this 4th day of February, 2015.

13
14 Respectfully submitted,

15
16 /s/ Ami Silverman

17 /s/ Robert MacKay

18 Attorneys for Petitioner

19 E-mail: ami.silverman@nrlb.gov

20 E-mail: robert.mackay@nrlb.gov
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EXHIBIT A

1 Q Did he say who had brought it up to you before?

2 A Yes, Miller. Jay Miller has brought it up to me before.

3 Q And what had Jay Miller brought up to you before?

4 A By just telling me that I don't supposed to be giving out
5 papers during working hours.

6 Q And you mentioned suspension. What did he say about a
7 suspension, Nick Palaez?

8 A Just since I've been coached about things like the
9 petition and handing out cards and, you know, talking about the
10 Union, he just decided to, you know, to suspend from me --
11 suspend me for one day.

12 Q And did you leave work at that moment or not until the end
13 of your shift?

14 A At the end of my shift.

15 Q And did you serve your one-day suspension?

16 A Yes.

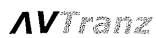
17 Q And in the year before that, in the year that you had
18 worked for the company up until that point, what types of
19 subjects did -- would employees talk about during work?

20 A During work? Everything. I'd say we'd talk about
21 partying to cars and sports, a lot of things in general.

22 Q Can you name more things that you guys talked about?

23 A I'd say like, coffee, issues with their couples issues and
24 stuff.

25 Q Couples issues?



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1 A Yes, couples issues. Sorry.

2 Q And how often would employees talk about these subjects
3 that you named?

4 A Every day, daily. On a daily basis.

5 Q Did you talk about them during work hours?

6 A During work hours and break.

7 Q And during non-work hours?

8 A And non-working hours.

9 Q Were you ever written up or disciplined for talking about
10 these other subjects during work?

11 A No.

12 Q Did you ever hear about any other employees written up or
13 disciplined?

14 A No.

15 Q All right. After you served your one-day suspension, did
16 supervisors meet with you to talk to you about your -- about
17 your work performance?

18 A Yes.

19 Q And who was that?

20 A Kimberly.

21 Q Okay. Kimberly Hazard?

22 A Yes.

23 Q Was there anyone with her?

24 A Just -- no, just Kimberly Hazard.

25 Q Okay. And where did Kimberly Hazard meet with you?



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High Flying Foods

To: Francisco Hernandez
From: Kimberly Hazard
CC: Carrie Williams
Date: August 11, 2014
Re: Final written warning

This is a final corrective action to Francisco Hernandez for not following direction from managers and consistent violation of company policies and procedures.

Francisco has been coached as follows:

July 25, 2014: Francisco received a final warning for insubordination by not following manager Mike Zavala's direction.

August 2, 2014: Francisco posted a Union memo on top of a Company memo that had been posted by store managers for employees to read. Nic Pelaez and Magdalena Bischoff met with Francisco to review the procedure to post Union memos. He was instructed to check with manager on duty for best placement of memos so it is not disruptive to our company communication.

August 1st, 2014: Manager Pete Contreras reiterated to Francisco the procedure for handling delivery invoices. Francisco had been trained on this in the past and in multiple occasions; Francisco did not mark invoices correctly to verify accuracy on items being delivered. Francisco challenged manager Pete Contreras when he was being coached on the process. During a follow up meeting, Nic Pelaez and Magdalena Bischoff explained to Francisco the correct process to mark invoices to verify accuracy in deliveries.

August 7, 2014: When receiving a delivery for Stone Brewery, Francisco marked all items as received on the invoice. Our vendor contacted us later that day to notify us they had not been able to deliver spring mix and they had shortened us of that product. Francisco accepted the order marking the spring mix as received.

August 8, 2014: A Phil's employee approached manager Jay Miller about Francisco talking to him re: Union business while this employee was working. Manager Jay Miller and Nic Pelaez met with Francisco to address this incident. Francisco was asked not conduct outside business at the work place and all conversations to happen outside of work time.

Other past incidents where Francisco failed to follow airport procedures are:

March 8, 2014: Francisco did not follow TSA procedures when escorting a new employee who was training. Francisco left the employee who he was escorting alone with no supervision on his part.

March 4, 2014: Francisco triggered a SIDA door in T2W and left the door unsecured. He did not wait for Harbor Police department to arrive to site as instructed during his SIDA training class taken on June 28, 2013.

All of these instances are violation of company policies and procedures. Francisco has been trained at multiples times on these procedures and he is expected to follow direction and enforce company policies.

Actions and Timeframe for Improvement: Effective immediately Francisco must:

- Reread the company handbook and follow all company policies and procedures.
- Francisco is receiving a copy of the employee handbook today.

Consequences for Future Infractions: Failure to follow company policy or procedures may result in further disciplinary action up to and including termination of employment

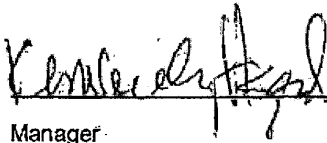
I have met with my manager and have reviewed and discussed the above. This action is the result of performance deficiencies, problems, and/or other concerns cited herein and summarized for inclusion in my personnel file. I understand that if I fail to improve and/or correct the behavior noted above, that I could be subject to further disciplinary actions up to and including termination. Signing this document is not an admission, but an acknowledgement that I have been counseled and warned as noted above.



Employee

8/11/14

Date



Manager

8/11/14

Date



Witness

8/11/14

Date

High Flying Foods

To: Francisco Hernandez
From: Kimberly Hazard
CC: Carrie Williams
Date: August 18, 2014
Re: Termination

On August 15th, when receiving a delivery for Stone Brewery, Francisco marked all items as received on the invoice. Our vendor contacted us later that day to notify us they had not been able to deliver sausage and Francisco marked it off as received, and they had shortened us of that product and sent us an email following up letting us know it he not been sent with the order.

Francisco has been previously coached as follows:

August 11, 2014: When receiving a delivery for Stone Brewery, Francisco marked all items as Received in the invoice. Our vendor contacted us later that day to notify us they had not been able to deliver spring mix and they had shortened us of that product. When asked about this, Francisco accepted marking the spring mix as received.

August 2, 2014: Pete Contreras reiterated to Francisco the procedure for handling delivery invoices. Francisco had been trained on this in the past and in multiple occasions; Francisco did not mark invoices correctly to verify accuracy on items being delivered. Francisco challenged manager Pete Contreras when he was being coached on the process. During a follow up meeting, Nic Pelaez and Magdalena Bischoff explained to Francisco the correct process to mark invoices to verify accuracy in deliveries.

July 25, 2014: Francisco received a final warning for insubordination by not following manager Mike Zavala's direction.

This clearly violates High Flying Foods policies and procedures.

Standards of conduct (Page 18 of Highflying Foods Employee Handbook)

Insubordination, including but not limited to failure or refusal to obey the lawful orders or instructions of a supervisor or member of management.

"Falsifying employment records, employment information, or other company records."

Hernandez, Francisco 8/18/2014

Therefore, we are processing termination effective today, August 18, 2014.


Francisco, with this Memo you are receiving your paycheck for hours worked from 8/1/2014 to today and the additional pay owed as noted below:

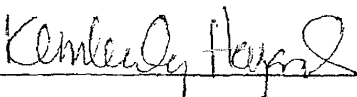
Regular Hours 79.84
OT Hours .74
Reporting Time 8/16/2014- 4.0 Hours
Reporting Time 8/18/2014-4.0 Hours
Accrued Paid Time Off -24.73

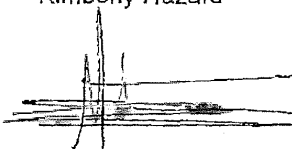
Please contact the HR Manager at humanresources@highflyingfoods.com for any change of address to send you tax related paperwork.

Your health insurance premiums (medical, dental and vision) were paid through August 31, 2014. Information regarding the continuation of your medical, dental and vision coverage will be sent separately by Discovery Benefits today. You have up to 60 days to elect coverage.

On behalf of the company, we wish you the best of luck in all your future endeavors. If you have any questions please feel free to contact Human Resources at humanresources@highflyingfoods.com


Francisco Hernandez
8/18/14
Date


Kimberly Hazard
8/18/14
Date


Witness
8/18/14
Date

Hernandez, Francisco 8/18/2014

EXHIBIT NO. CC15 RECEIVED ☒ REJECTED

21-CA-135596
CASE NO. CASE NAME: High flying

NO. OF PAGES: 2 DATE: 1/12/15 REPORTER: T. Ray

High Flying Foods

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All of these instances are violation of company policies and procedures. Francisco has been trained at multiples times on these procedures and he is expected to follow direction and enforce company policies.

Actions and Timeframe for Improvement: Effective immediately Francisco must:

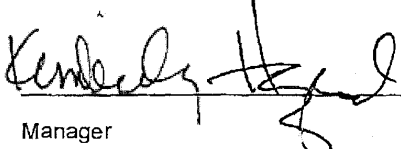
- Reread the company handbook and follow all company policies and procedures.
- Francisco is receiving a copy of the employee handbook today.

Consequences for Future Infractions: Failure to follow company policy or procedures may result in further disciplinary action up to and including termination of employment

I have met with my manager and have reviewed and discussed the above. This action is the result of performance deficiencies, problems, and/or other concerns cited herein and summarized for inclusion in my personnel file. I understand that if I fail to improve and/or correct the behavior noted above, that I could be subject to further disciplinary actions up to and including termination. Signing this document is not an admission, but an acknowledgement that I have been counseled and warned as noted above.



Employee Date 8/11/14



Manager Date 8/11/14



Witness Date 8/11/14

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EXHIBIT NO. CC14 RECEIVED ☒ REJECTED

21-CA-135596
CASE NO. _____ CASE NAME: High Flying

NO. OF PAGES: 2 DATE: 11/2/15 REPORTER: T. Ray

Erin R. Whitlock

From: Nicolas Pelaez <npelaez@highflyingfoods.com>
Sent: Saturday, August 09, 2014 4:28 PM
To: Kevin Westlye; Maritza Haller; Kimberly Hazard; Carrie Williams
Subject: Francisco Suspension - 8/10/14
Attachments: Note to file: Francisco Hernandez union talk; Francisco Hernandez union papers

Hello all,

Jay and I sat down with Francisco at 12pm today. I went over the note to file where Jay discussed not talking about outside business, in this case the union, at work while on the clock. I reiterated that I chatted with him the next day (6/28/14) to make sure he was clear. He said he remembered both of those instances.

I told Francisco that I had received a report of him talking with another employee about the union on the clock today. He said he was on break and the person on the clock approached him. I asked him if he knew that the other person was on the clock. Francisco said he did know that. I asked him if he knew how he should have handled it and he said he should have told the other person to chat with him after work or off the clock. I told him that was exactly what I would expect him to do. He mentioned that no one was around so he thought it would be OK. I coached Francisco saying integrity is doing the right thing when no one is around. This time he broke policy when no one was around but he still broke policy. Being a utility, and often being alone, I expect that he can handle minimal supervision. I told him I was disappointed with his actions. Francisco apologized and said it would not happen again. Francisco did ask a couple things: If talking about soccer would it be wrong? I said no, that any non-business conversation is considered OK as long as it does not interfere with work. At no time though is outside business allowed at work while on the clock. Francisco asked if the rules changed when we became union and asked if we were union. I explained that while we were becoming union, there was no contract and our handbook was our rules and procedures. Talking about outside business, while on the clock at work, is against our rules. While we are going to become union or even when our contract is in place, it is not acceptable at work, while on the clock. I told Francisco that he knew this policy as he had been coached by Jay and I, and had also made a point to have conversations on his break and after work. He agreed that he did understand.

Francisco is suspended tomorrow, Sunday, August 10th. He is scheduled to come back to work Monday at 4am. Please let me know if we need to change that.

Thank you,

Nic

-----Original Message-----

From: Kevin Westlye
Sent: Saturday, August 9, 2014 11:20 AM
To: Nicolas Pelaez; Maritza Haller; Kimberly Hazard; Carrie Williams
Subject: RE: Francisco

If we set up a quick meeting with Francisco (2 mgrs) so we have a witness) we can simply ask him if he was discussing the union with Jesse. If he says yes he was we can suspend him and talk further.

Kevin

From: Nicolas Pelaez
Sent: Saturday, August 09, 2014 8:54 AM

To: Maritza Haller; Kimberly Hazard; Kevin Westlye; Carrie Williams
Subject: Francisco

Hello all,

Just got this text from Jay - "Hey .. sorry to bug you before you're here, but potentially just hit that last straw. Francisco was talking to jesse about union while jesse was on the clock, francisco on break. I didn't observe myself but jesse told me."

Would like to suspend but Jesse versus Francisco without a manager being present doesn't seem like a strong defense. Thoughts?

-Nic Peláez

503.929.5773

**High Flying Foods Restaurant Group
Employee Written Warning Form**

Banker's Hill

Employee Name: Martin Duarte

Manager: Steve Lyle

Date of Warning: July 22, 2014

Please Check One:

Verbal X 1st Written 2nd Written Final

Reason for Warning: The morning of July 18, 2014, Martin Duarte was witnessed by manager on duty, Eddie Almada, conducting business with another employee while on the clock. Martin was standing in front of the entrance way by the kitchen discussing union business matters. Both employees were not performing any work duties while the conversation was taking place.

Company policy states:

Conducting Personal Business (pg. 28)

Employees are to conduct only restaurant business while at work. Employees may not conduct personal business for another employer during their scheduled working hours.

Actions and Timeframe for Improvement: Effective immediately Martin must:

- Reread the company handbook and follow all company policies and procedures.
- **Discontinue conducting personal business for another employer during working hours.**

Consequences for Future Infractions: Failure to follow company policy or procedures may result in further disciplinary action up to and including termination of employment

I have met with my manager and have reviewed and discussed the above. This action is the result of performance deficiencies, problems, and/or other concerns cited herein and summarized for inclusion in my personnel file. I understand that if I fail to improve and/or correct the behavior noted above, that I could be subject to further disciplinary actions up to and including termination. Signing this document is not an admission, but an acknowledgement that I have been counseled and warned as noted above.

Employee Signature: Refuse to Sign

Date: _____

Manager Signature: [Signature]

Date: 7/22/14

Witness Signature: [Signature]

Date: 7/22/14

Explanation if Employee Refuses to Sign: [Signature]

High Flying Foods Restaurant Group Employee Written Warning Form

THE COUNTER

Employee Name: Ana Rivera

Manager: Laura Cano

Date of Warning: 06/24/14

Please Check One:

Verbal ☒ 1st Written ☐ 2nd Written ☐ FINAL ☐

Reason for Disciplinary Action: On Jun 24, 2014, Ana Rivera was speaking Spanish to Raul Barba and Joe Cook while she was in the front of the house. Raul Barba and Joe Cook replied back to her in English. This is a violation of our "Knowledge and Use of the English Language" policy which states:

"As a courtesy to our customers, all employees who deal directly with the public are expected to be able to speak, read, and understand the English language. You must speak English when talking to, or when in close proximity to, English-speaking customers or employees. If a customer speaks to you in another language, you may respond in that language if you are able to do so, or find another employee or manager to help you."

Actions and Timeframe for Improvement: Effective immediately employee must:

- Reread the company handbook and follow all company policies and procedures.
- Follow proper procedures for communication in the workplace.

Consequences for Future Infractions: Failure to follow company policy or procedures may result in further disciplinary action up to and including termination of employment

I have met with my manager and have reviewed and discussed the above. This action is the result of performance deficiencies, problems, and/or other concerns cited herein and summarized for inclusion in my personnel file. I understand that if I fail to improve and/or correct the behavior noted above, that I could be subject to further disciplinary actions up to and including termination. Signing this document is not an admission, but an acknowledgement that I have been counseled and warned as noted above.

Employee Signature: Ana Rivera
Manager Signature: Laura Cano
Witness Signature: Chris [illegible]

Date: June 27/14
Date: 6/27/14
Date: 6/27/14

Explanation if Employee Refuses to Sign:



High Flying Foods

Memo

To: Mima Soto
From: Kevin Westlye
CC: Human Resources
Date: August 28, 2014
Re: Termination

Mima,

Employees have filed complaints against you for creating a hostile work environment based upon incidents on two separate days. We have conducted an investigation by interviewing each employee.

Company policy states:

"In compliance with federal, state and local laws, and consistent with the Anti-Discrimination Policy, the Company strictly prohibits harassment of any employee in any form. All employees are responsible for creating a professional work environment free from harassment of any kind and retaliation. We will not tolerate any employees engaging in harassment."

"Prohibited unlawful harassment includes, but is not limited to, the following behavior: gossip whether truthful or made up which can be hurtful, mean and disrespectful and create a hostile environment for fellow employees; and retaliation for reporting or threatening to report harassment."

"If High Flying Foods determines that unlawful harassment has occurred, disciplinary action up to and including termination will be taken in accordance with the circumstances involved. A restaurant representative will advise all parties concerned of the result of the investigation pursuant to law. High Flying Foods will not retaliate against you or any witnesses for filing a complaint and will not tolerate or permit retaliation by management, employees, or coworkers."


Based upon the investigation we are terminating your employment effective today, August 28, 2014.


Soto-8/28/2014-Page 1

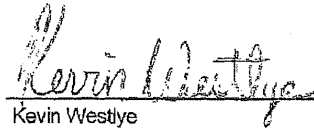
Your health insurance premiums (medical, dental and vision) were paid through August 31, 2014. Information regarding the continuation of your medical, dental and vision coverage will be sent separately by Discovery Benefits today. You have up to 60 days to elect coverage.

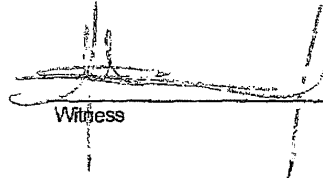
With this Memo you are receiving your paycheck for hours worked from 8/16/2014 to today. In addition you will receive all PTO hours paid at your regular rate of pay.

On behalf of the company, we wish you the best of luck in all your future endeavors. If you have any questions please feel free to contact Human Resources at humanresources@highflyingfoods.com.

 8.28.14
Mima Soto Date

 8-28-14
Witness Date

 8.28.14
Kevin Westlye Date

 8/28/14
Witness Date

• Soto-8/28/2014-Page 2

EXHIBIT NO. GC19 RECEIVED ☒ REJECTED

CASE NO. 21-CA-135596 CASE NAME: High Flying

NO. OF PAGES: 2 DATE: 1/13/15 REPORTER: T. Dany

8-28-14

My employer asked me to write a statement responding an allegation that I created a hostile work environment. My employer refused to give me any specifics about created this environment. I do not know what situations my employer is referring to. He will not give any specifics so I don't know how to defend myself or explain my understanding of this situation.

Muna Soto
MS

1 There are restaurants in two terminals at San Diego airport,
2 airport travelers expect prompt, quick service because they're
3 usually there with only a brief amount of time to get to their
4 planes, and they expect high-quality product. So there is a
5 demand for performance and this is a high-paced environment.
6 These rules are necessary and they are in no way, shape or form
7 aimed at undermining the Union or derogating the Union. There
8 will be no testimony in this case whatsoever that any manager
9 said anything derogatory or negative about the Union.

10 Yes, the company entered into the neutrality card check
11 agreement. It was a system in place before the company bid on
12 the business at San Diego airport, and we gladly entered into
13 the neutrality agreement because that is the way this company
14 operates, that is the way this company has operated in San
15 Francisco and at Oakland.

16 There are two discharge discriminatees in this case, Mirna
17 Soto and Francis Hernandez. The evidence will show with
18 respect to Mirna Soto that this was an employee who did not
19 work well and play well with others. She was abrasive. She
20 was territorial. She attempted to undermine manager direction,
21 which interfered with the good work order of the operations of
22 the company. She violated several rules along the way, and you
23 will hear all of this evidence and you will be convinced that
24 the evidence is compelling and unmixed with evidence of
25 antiunion animus. Ms. Soto was terminated for grossly



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